

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

YURIY PENKOV,

Defendant and Appellant.

C068516

(Super. Ct. No. 09F02289)

A jury in Sacramento County found defendant Yuriy Penkov guilty of unlawfully possessing ammunition.<sup>1</sup> The trial court (Sacramento County) sentenced him to state prison for one-third the midterm (eight months) to run consecutive to a four-year term for a previous drug conviction from Yolo County, denying defendant's request to impose a lower term on the drug offense or designate the ammunition offense as the principal term. Defendant appeals, contending the trial court incorrectly found it lacked jurisdiction to

---

<sup>1</sup> Former Penal Code, section 12316, subdivision (b)(1); triad of 16 months, 2, or 3 years; (now Pen. Code, § 30305, subd. (a)(1); Stats. 2010 ch. 711, § 4, operative Jan. 1, 2012). Further undesignated statutory references are to the Penal Code.

designate defendant's ammunition offense the principal term at the time of sentencing. As we will explain, we conclude that the trial court properly sentenced defendant.

## **PROCEDURAL BACKGROUND<sup>2</sup>**

On July 13, 2010, the trial court in Yolo County sentenced defendant to state prison for an aggregate term of six years--the upper term of four years for transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)), a stayed sentence of an unspecified duration for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and a consecutive term of two years for an on-bail enhancement (§ 12022.1, subd. (b); two years consecutive).

On June 2, 2011, when sentencing defendant on his current ammunition possession offense, the trial court in Sacramento County resentenced on the Yolo County offenses as well. Defense counsel requested that the court either impose the low-term sentence of two years for the drug offense, or designate the current ammunition offense the principal term, imposing the upper term of three years, and the drug offense a subordinate term, imposing one-third the midterm or one year.

Noting that it “cannot change the sentence that was previously imposed by another county judge,” the trial court added that it had no “authority to supersede or intercede in another judge’s findings or sentencings or determination.” It imposed the upper term of four years for the transportation offense, stayed sentence on the possession offense, and imposed a consecutive one-third the midterm or eight months for defendant’s current ammunition possession offense. The court also imposed the two-year term for the on-bail enhancement.<sup>3</sup>

---

<sup>2</sup> We do not recite the facts underlying defendant’s offenses of conviction, as they are irrelevant to the issue raised on appeal.

<sup>3</sup> Pursuant to defendant’s request, we took judicial notice of case Nos. C063452 and C065585. In *People v. Yuriy Penkov* (C063452 and C065585) [nonpub. opn.] filed

## DISCUSSION

### A. *The Law*

“[W]hen a defendant is sentenced consecutively for multiple convictions, whether in the same proceeding or in different proceedings, the judgment or aggregate determinate term is to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms. (§ 1170.1, subd. (a).)” (*People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1552.)

“As a general rule, a sentence lawfully imposed may not be modified once a defendant is committed and execution of his sentence has begun. [Citations.] . . . [¶] However, section 1170.1, subdivision (a) represents a statutory exception to the general rule . . .” (*People v. Bozeman* (1984) 152 Cal.App.3d 504, 507 (*Bozeman*).)

Section 1170.1, subdivision (a), provides in pertinent part that when a person is convicted of two or more felonies, “whether in the same proceeding or court or in different proceedings or courts,” and a consecutive term of imprisonment is imposed, “the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements . . . . The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . .”

---

August 22, 2011, (pet. for review denied Dec. 14, 2011 (S196466)) this court stayed execution of the Yolo County court’s imposition of the two-year enhancement pending a determination by either Sacramento or Yolo County court that defendant was convicted of the primary offense, at which time the stay would be lifted and the two-year term would become effective immediately. (Opn., at pp. 37-42, 47.)

California Rules of Court,<sup>4</sup> rule 4.452, provides, in relevant part, as follows:

“If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:

“ . . .

“(3) *Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision to impose one of the three authorized prison terms referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement.*” (Italics added.)

#### *B. Analysis*

The law required the Sacramento County court to impose a single aggregate sentence, combining all counts in both cases, and make a new determination of which count represented the principal term. (Rule 4.452(1), (2).) The Yolo County court’s discretionary decision to impose the upper term of four years on the drug offense was the “greatest term of imprisonment” for any of the crimes. (§ 1170.1, subd. (a).) Rule 4.452(3) prohibited the Sacramento County court from deviating from the Yolo County court’s discretionary decision to impose the upper term. (See *In re Reeves* (2005) 35 Cal.4th 765, 773.) The Sacramento County court properly recognized it lacked discretion to select any term other than the upper term of four years for the drug offense when resentencing defendant.

---

<sup>4</sup> Further undesignated rule references are to the California Rules of Court.

Nonetheless, citing *People v. Miller* (2006) 145 Cal.App.4th 206 (*Miller*), defendant argues that the Sacramento County court “had the discretion to fashion an overall aggregate sentence that was not controlled by the greatest triad.” Defendant’s reliance upon *Miller* is misplaced. *Miller* did not involve resentencing on one or more determinate sentences imposed previously in another court which had already exercised its sentencing discretion. In *Miller*, defendant’s multiple convictions, from which the trial court chose a term to designate as the principal term, were *current* convictions. (*Miller, supra*, 145 Cal.App.4th at pp. 210, 217.) The trial court’s error in *Miller* was its assumption that the law required it to designate the principal term from the *highest sentencing triad available* under defendant’s plea agreement (see *Miller, supra*, at p. 218), which is not at all on point to the situation in the instant case. Here, the Sacramento County court did not merely look to the *triad*, it properly looked to the longest term of years previously imposed.<sup>5</sup>

Defendant relies on *Bozeman* for the proposition that a trial court may reduce a previous court’s upper term sentence to a subordinate one-third the midterm. However, *Bozeman* was decided prior to the 1991 adoption of rule 4.452 [previously rule 452]. Citing an Advisory Committee comment to rule 4.452, defendant argues that the Sacramento County court was not restricted by law from “deviating from certain specifics of Yolo County’s sentence.”<sup>6</sup> The comment, construed in context, clarifies only that if a

---

<sup>5</sup> We disregard defendant’s discussion regarding an unpublished opinion of this court, see rule 8.1115(a).

<sup>6</sup> The Advisory Committee comment states: “The restrictions of subdivision (3) [of rule 4.452] do not apply to circumstances where a previously imposed base term is made a consecutive term on resentencing. If the judge selects a consecutive sentence structure, and since there can be only one principal term in the final aggregate sentence, if a previously imposed full base term becomes a subordinate consecutive term, the new consecutive term normally will become one-third the middle term by operation of law (section 1170.1(a)).”

previous discretionary choice becomes a subordinate consecutive term through application of a consecutive sentencing structure, the term is one-third the midterm. The change described by the comment is by operation of law, and does not bestow on a sentencing court the ability to *change* a discretionary decision previously made by an earlier sentencing court in order to lower an aggregate sentence--the situation in this case.

Here, the trial court properly recognized it had no authority to lower the upper term sentence previously imposed. There was no error.

#### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
DUARTE, J.

We concur:

\_\_\_\_\_  
BLEASE, Acting P. J.

\_\_\_\_\_  
HOCH, J.